IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KENYATTA JOHNSON	**:**	**CIVIL ACTION**
	:	
v.	**:**	
	:	
CITY AND COUNTY OF	**:**	
PHILADELPHIA, et al.	**:**	**NO. 08-1748**

MEMORANDUM AND ORDER

L. Felipe Restrepo **April 16, 2008**
United States Magistrate Judge

Plaintiff, Kenyatta Johnson, filed this action "challenging the constitutionality of various municipal ordinances that [allegedly] violate his First and Fourteenth Amendment rights under the United States Constitution and his civil rights and rights of electors in Federal elections under the Twenty-Fourth Amendment." See Pl.'s Compl. at 1. Before the Court is plaintiff's Emergency Motion for Preliminary Injunction seeking to enjoin the defendants and their agents, servants, employees and attorneys, and all persons in active concert and participation with the defendants from enforcing Chapter 10-1200 ("Posting of Signs") of the Philadelphia Code ("the Code") in that this ordinance allegedly "inerfer[es] with free and fair elections in the 2008 election cycle." See Pl.'s Mot. 1. For the reasons which follow, plaintiff's motion for an emergency preliminary injunction is denied.

1. BACKGROUND

The parties are largely in agreement as to the relevant underlying facts in this case. Mr. Johnson is a 2008 candidate for State Representative in the 186th Legislative District of

Pennsylvania. The Pennsylvania Primary is scheduled to be held on April 22, 2008.

Plaintiff purchased 5,000 political signs for his 2008 campaign for state office and freely gives them to his supporters throughout the 186th Legislative District within Philadelphia County for display on their property and in public fora. Several thousand of these signs have been posted, and plaintiff's counsel represented at the hearing before this Court on April 14, 2008 that well over half of these posted signs have been placed in the windows of campaign supporters' homes and businesses.

Chapter 10-1200 of the Code concerns the posting of signs. Section 10-1202 ("Prohibited Conduct") of the Code provides:

> (a) Except as provided in subsection (b), no person shall post any sign on any:
>
> (1) utility pole;
>
> (2) streetlight;
>
> (3) traffic or parking sign or device, including any post to which such sign or device is attached;
>
> (4) historical marker; or
>
> (5) City-owned tree or tree in the public right-of-way.
>
> (b) A person may post a sign on a streetlight provided the sign complies with the requirements of the Banner Program, as defined by regulations promulgated by the Department of Streets.

Phila. Code § 10-1202.[1] By letter dated March 26, 2008, Mr. Johnson was notified by the Philadelphia Department of Licenses and Inspections ("L&I") that:

> If any types of your signs or signs promoting your candidacy are placed [in violation of Chapter 10-1200 of the Code,] they must be removed immediately. Any sign that is not removed will be

[1]Plaintiff has not asserted that he applied to participate in the City's Banner Program, which relates to hanging banners made of nylon or similar fabric, see Regulation of the Department of Streets: Banner Program on Streetlights (Ex. D to Def.'s Br.). Furthermore, at the April 14, 2008 preliminary injunction hearing, plaintiff's counsel acknowledged that the ordinance challenged by the preliminary injunction motion is content-neutral.

> confiscated without prior notice by the City under the authority of this section of the Philadelphia Code, and in accordance with the Code you will be billed for the cost incurred for the removal plus a $75 penalty.

See Letter to Pl. from L&I dated 3/26/08 (attached to Pl.'s Compl.). Plaintiff has acknowledged having personal knowledge of the City's sign ordinance at the time he purchased his signs.

In support of his Emergency Motion for Preliminary Injunction, plaintiff contends that political signs are core political speech guaranteed the highest protection of the First Amendment and that the challenged ordinance restrains the campaign of a candidate with limited funds as there is no reasonably priced alternative for communication of a candidate's or property owner's message. See Pl.'s Br. 2-7. Plaintiff further argues that "the right of way" is a traditional public forum for political speech in the form of a political sign. Id. at 8. Finally, he argues that the relevant facts in this case support a finding that a preliminary injunction is warranted, and that the enforcement of Chapter 10-1200 of the Code should be enjoined. Id. at 9-12.

Defendant, City of Philadelphia, responds that plaintiff cannot demonstrate a likelihood of success on the merits and cannot prove irreparable harm. See Def.'s Br. 7-16. Defendant further argues that the City will be harmed significantly and significant public interests would be harmed if the Court grants a preliminary injunction. Id. at 16-17. Therefore, defendant requests that the Court deny plaintiff's motion. Id. at 17.

2. DISCUSSION

A "preliminary injunction is an **extraordinary and drastic remedy**, one that should not be granted unless the movant, by a **clear showing**, carries the burden of persuasion." Mazurek v.

Armstrong, 520 U.S. 968, 972 (1997) (emphases added); see O'Neill v. Twp. of Lower Southampton, 2000 WL 337593, at *1 (E.D. Pa. Mar. 30, 2000) ("The grant of an injunction, prior to a full hearing on the merits, is an extraordinary remedy and requires Plaintiff to meet a high burden of proof."). To obtain a preliminary injunction, plaintiff has the burden of demonstrating both (1) that he is reasonably likely to succeed on the merits and (2) that he is likely to suffer irreparable harm without a preliminary injunction. Adams v. Freedom Forge Corp., 204 F.3d 475, 484 (3d Cir. 2000); Bella Vista United v. City of Phila., 2004 WL 825311, at *3 (E.D. Pa. Apr. 15, 2004). If these factors are shown, the Court may also examine the likelihood of irreparable harm to the non-moving party and whether the issuance of a preliminary injunction would serve the public interest. Adams, 204 F.3d at 484; Bella Vista United, 2004 WL 825311, at *3. If plaintiff fails to meet any of the four factors, the injunction must be denied. O'Neill, 2000 WL 337593, at *1 (citing Premier Dental Prods. Co. v. Darby Dental Supply Co., 794 F.2d 850, 851-52 (3d Cir. 1986), cert. denied, 479 U.S. 950 (1986)).

In this case, as indicated at the preliminary injunction hearing, the parties are in agreement that the challenged ordinance is content-neutral. See, e.g., Frumer v. Cheltenham Twp., 709 F.2d 874, 875, 877 (3d Cir. 1983) (township ordinance prohibiting temporary signs from being "affixed to utility poles, street signs or any other structures within the rights-of-way of public streets or highways within the Township" was facially content-neutral). "[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided [1] the restrictions 'are justified without reference to the content of the regulated speech, [2] that they are narrowly tailored to serve a significant governmental interest, and [3] that they leave open ample alternative channels for communication of the information.'"

Riel v. City of Bradford, 485 F.3d 736, 743 (3d Cir. 2007) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)); see Frumer, 709 F.2d at 876 (quoting American Future Sys., Inc. v. Pa. State Univ., 688 F.2d 907, 915 (3d Cir. 1982)) ("It is undisputed that even speech entitled to the highest First Amendment protection may be subject to reasonable time, place and manner regulations that are content-neutral, serve a significant governmental interest, and that leave open ample alternative channels for communication of the information.").

The content-neutrality of the challenged ordinance has been conceded. Furthermore, the City argues that its sign ordinance is narrowly tailored to further its interests in safety and aesthetics. See Def.'s Br. 7. In City of Ladue v. Gilleo, 512 U.S. 43 (1994), the Supreme Court emphasized that:

> While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation.

See Riel, 485 F.3d at 751 (quoting Gilleo, 512 U.S. at 48). Furthermore, the Supreme Court has recognized that the goals of "traffic safety and the appearance of the city[] are substantial governmental goals." See Riel, 485 F.3d at 751 (quoting Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08 (1981) (plurality opinion)); see also Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984) ("It is well settled that the state may legitimately exercise its police powers to advance esthetic values."). The Supreme Court has not required that the fact that an ordinance serves significant governmental interest in traffic safety and community aesthetics be established by empirical data. Frumer, 709 F.2d at 877. "Instead

the legislative judgment that such goals are advanced by an ordinance is deferred to unless it is facially unreasonable." Id. (citing Metromedia, 453 U.S. at 507-08). Moreover, the Third Circuit has affirmed this District Court's denial of a preliminary injunction where the challenged ordinance prohibited temporary signs from being affixed to utility poles, street signs and other structures within the rights-of-way of public streets, where the purpose of such an ordinance was traffic safety and community aesthetics. See Frumer v. Cheltenham Twp., 545 F. Supp. 1292, 1294-95 (E.D. Pa. Sept. 3, 1982), aff'd, 709 F.2d at 877-78; see also Sokolove v. City of Rehoboth Beach, Del., 2005 WL 1800007, at *6 n.11 (D. Del. July 28, 2005) (finding that plaintiff failed to demonstrate that the challenged ordinance which prohibited the placement of signs on public property was not appropriately tailored).

With regard to alternative channels for communication of the information, the City has submitted the report of Larry Ceisler, the City's expert in political campaigns, who states that candidates in Philadelphia have many relatively inexpensive alternatives to posting signs on public property in which to communicate their messages. For example, candidates in the City rely on door-to-door canvassing and literature-dropping, posting signs on private property and phone calls. The challenged sign ordinance does not prevent candidates from using these other non-sign based forms of communication. Moreover, plaintiff's counsel acknowledged that well-over half of the signs posted have been posted in windows of private residences and businesses.

In Vincent, the Supreme Court explained that "nothing in the findings indicate[d] that the posting of political posters on public property is a uniquely valuable or important mode of communication." Vincent, 466 U.S. at 812. To the contrary, the Court explained that "the findings of the District Court indicate[d] that there [were] ample alternative modes of

communication." Id. For example, "the sign prohibition did not prevent [plaintiffs] from exercising their free speech right on the public streets and in other public places; they remain free to picket and parade, to distribute handbills, to carry signs and to post their signs and handbills on their automobiles and on private property." Id. at 795.

Similarly, in Sokolove the District Court observed that "in light of the accessibility of private property for the posting of signs, and given the availability of other forms of campaigning, such as direct mail, newspapers, and door-to-door canvassing, I cannot say on the present record that there are inadequate alternative channels for communication." Sokolove, 2005 WL 1800007, at *6 n.11. As the District Court stated in Sokolove:

> At **this preliminary stage**, however, I must be mindful that it is the plaintiffs' burden to demonstrate that the regulation is not appropriately tailored for the stated end. . . . [T]he record now is what it is, and, in light of the accessibility of private property for the posting of signs, and given the availability of other forms of campaigning, such as direct mail, newspapers, and door-to-door canvassing, I cannot say on the present record that there are inadequate alternative channels for communication.

Sokolove, 2005 WL 1800007, at 6 n.11 (emphasis added).

The Third Circuit in Frumer also affirmed this District Court's denial of a preliminary injunction where the Court held that ample alternative forms of communication were available to plaintiffs, pointing to such alternatives as "the distribution of leaflets and the use of bumper stickers." See Frumer, 709 F.2d at 878. The Court of Appeals pointed out that the concern **at this stage** of the proceedings is with predicting the likelihood that plaintiff would succeed on the merits, and "[i]n that context, the existence of alternative forms of communication which are at least arguably as effective as signs and which require little more effort or money indicates that

plaintiffs are not likely to prevail" with their challenge to the ordinance. See Frumer, 709 F.2d at 878. In this case, plaintiff has failed to demonstrate that he is reasonably likely to succeed on the merits. See, e.g., Frumer v. Cheltenham Twp., 545 F. Supp. 1292 (E.D. Pa. 1982), aff'd, 709 F.2d 874 (3d Cir. 1983) (denying motion for preliminary injunction challenging enforcement of ordinance prohibiting temporary signs from being affixed to structures within the rights-of-way of public streets); see Sokolove, 2005 WL 1800007, at *7 (denying plaintiff's request for preliminary injunction challenging local ordinance which prohibited the placement of signs on public property).

In addition, to demonstrate that a preliminary injunction is warranted in this case, "the need remains for plaintiff[] to show a 'real or immediate' danger to the First Amendment rights of those affected by [the] challenged ordinance[]." See Bella Vista United, 2004 WL 825311, at *8 (citing Anderson v. Davila, 125 F.3d 148, 164 (3d Cir. 1997)). Plaintiff fails to demonstrate that he is likely to suffer irreparable harm without a preliminary injunction. Although plaintiff asserts that he purchased 5,000 political signs and that several thousands of those signs have been distributed to campaign supporters, plaintiff indicated at the preliminary injunction hearing that well over half of those signs have been posted in windows on private property, which is not prohibited by the challenged ordinance. To the extent that plaintiff has posted signs on public property which is prohibited by the ordinance, there has been no evidence submitted that these signs have been removed. See, e.g., O'Neill v. Twp. of Northampton, 2000 WL 337593, at *2 (E.D. Pa. Mar. 30, 2000) ("Because O'Neill has placed signs in Warminster and they have not been removed, he has not demonstrated that he will suffer irreparable harm absent an injunction."). Indeed, plaintiff's counsel acknowledged that they posted signs despite being

aware of the challenged ordinance. On the record before this Court, plaintiff fails to show that he is likely to suffer irreparable harm without a preliminary injunction. See, e.g., O'Neill, 2000 WL 337593, at *2 (denying preliminary injunction because plaintiff failed to demonstrate a likelihood of success on the merits and that he would suffer irreparable harm absent an injunction.).

Accordingly, since plaintiff has failed to demonstrate that he is reasonably likely to succeed on the merits and that he is likely to suffer irreparable harm without a preliminary injunction, his motion is denied. See, e.g., Frumer v. Cheltenham Twp., 545 F. Supp. 1292 (E.D. Pa. 1982), aff'd, 709 F.2d 874 (3d Cir. 1983); Sokolove, 2005 WL 1800007, at *7; O'Neill, 2000 WL 337593, at *2. An implementing Order follows.

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O R D E R

AND NOW, this 16th day of April, 2008, upon consideration of Plaintiff's Emergency Motion for Preliminary Injunction and the Opposition thereto of Defendant, City of Philadelphia, for the reasons provided in the accompanying Memorandum, it is hereby **ORDERED** that plaintiff's motion is **DENIED**.

BY THE COURT:

/s/ L. Felipe Restrepo
L. FELIPE RESTREPO
UNITED STATES MAGISTRATE JUDGE